UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Charging Party, - and - XPO CARTAGE, INC., Respondent. .	Case Nos. 21-CA-150873 21-CA-164483 21-CA-175414 21-CA-192602

XPO CARTAGE, INC.'S POST-HEARING BRIEF

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XPO Cartage, Inc. ("Company" or "XPO"), by its attorneys and pursuant to the direction of the Administrative Law Judge, hereby submits its Post-Hearing Brief in support of its position that the National Labor Relations Board ("NLRB" or "Board") lacks jurisdiction in the above-captioned matter because the charging parties are independent contractors under the National Labor Relations Act ("NLRA" or "Act").

INTRODUCTION

Following a 13-day hearing and subsequent decision by Administrative Law Judge Dibble, the Board issued an order reopening the record in light of the Board's decision in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019). This Post-Hearing Brief focuses on the record evidence developed in the initial 13-day hearing prior to *SuperShuttle* and further in a supplemental 4-day hearing in response to the Board's order. The issue presented is whether the Independent Contractor tractor Owner-Operators and their drivers, fulfilling a portion of XPO's intermodal transportation obligations to its broker customers, are independent contractors or employees, as defined in the Act.

The record evidence clearly establishes the tractor Owner-Operators and their hired drivers (often referred to as "second-seat drivers") are in fact entrepreneurs who are independent contractors and not subject to the Board's jurisdiction. In *SuperShuttle*, the Board ruled that in addition to control, it must evaluate whether there exists significant economic opportunity for gain or loss for the putative contractor. As the record demonstrates, the Owner-Operators in the relevant time period had significant entrepreneurial opportunities for economic gain or loss. In fact, many Owner-Operators could and did earn over $100,000 and as much as over $500,000 in 1099 income operating their businesses. Other Owner-Operations who were less interested in pursuing XPO delivery opportunities or who were not as efficient in running their businesses earned much less, even in the $25,000 income range. Those widely varied results were a direct

result of various business decisions made by the Owner-Operators. There were no requirements, controls or restrictions imposed by XPO on Owner-Operators (apart from those required by federal and state law) to prevent them from contracting to perform delivery services for XPO customers or for other motor carriers, including those in the same intermodal business (or even hiring on as an employee with other carriers while still contracting with XPO). As part of the intermodal transport services XPO arranges in the competitive Los Angeles market for its customers XPO offered both individual and corporate Owner-Operators the ability to choose from a broad selection of available loads and fees (or chose to take none at all, and carry for themselves or others while remaining under contract with XPO). Owner-Operators unilaterally decided how to deploy their second seat drivers (if they chose to hire them), their tractors, and whether to engage, accept or decline opportunities to deliver to XPO customers. In this regard, Owner-Operators are XPO's vendors, and XPO is the customer of the Owner-Operators. Except for compliance with federal and other state regulatory requirements on commercial truck drivers, XPO exercises no control over the Owner-Operators' business decisions, how they elect to use their time, or which deliveries they elect to accept or not accept. Loads are offered. Owner-Operators decide whether to accept or decline them.

The Administrative Law Judge should also revisit the record evidence on entrepreneurial opportunity in particular in light of *SuperShuttle*:

- The wide range in Owner-Operator compensation;
- The Owner-Operators' total autonomy to decide whether, when, where, and how long to work;
- The Owner-Operators' total discretion to accept or reject loads;
- The individual and corporate Owner-Operators have significant opportunities to increase their income;

- The Owner-Operators can hire second-seat drivers to work in their stead, and in fact the Owner-Operators themselves do not even have to drive at all;
- The Owner-Operators have to make a significant initial investment or take on a serious risk of loss to enter into a relationship with XPO;
- The Owner-Operators were able to negotiate their contractual compensation;
- The Owner-Operators signed an agreement with XPO acknowledging their independent contractor status and XPO did not withhold taxes from the Owner-Operators' settlement or provide them with fringe benefits;
- The Owner-Operators indemnify XPO for various losses or damages that may arise during the performance of their services; and
- The Owner-Operators are paid by the assignment.

Moreover, evidence that the Administrative Law Judge rejected further support's XPO's position that the Owner-Operators and their hired drivers are independent contractors with respect to their relationship with XPO. XPO has summarized this rejected evidence in Appendix A.

As will be addressed further within, the XPO intermodal transport business offers significant entrepreneurial economic opportunities for gain or loss for the Owner-Operators at issue, dependent on factors the Owner-Operators control and decisions they make on how to run their businesses. They are clearly independent contractors under the now prevailing *SuperShuttle* standard.

I. BACKGROUND

Please see Section II (Statement of Facts) in XPO's initial Post-Hearing Brief for a complete description of record facts.

II. LEGAL STANDARD

A. The National Labor Relations Act and Independent Contractors

Section 2(3) of the National Labor Relations Act ("NLRA" or "Act") provides that the term "employee" shall not include "any individual having the status of an independent contractor." 29 U.S.C. § 152(3). The Board applies the common law agency test to determine whether a worker is an employee or an independent contractor under the Act. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968). This inquiry involves the application of the nonexhaustive common-law factors enumerated in the Restatement (Second) of Agency §220 (1958):

> (a) The extent of control which, by the agreement, the master may exercise over the details of the work.
>
> (b) Whether or not the one employed is engaged in a distinct occupation or business.
>
> (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
>
> (d) The skill required in the particular occupation.
>
> (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
>
> (f) The length of time for which the person is employed.
>
> (g) The method of payment, whether by the time or by the job.
>
> (h) Whether or not the work is part of the regular business of the employer.
>
> (i) Whether or not the parties believe they are creating the relation of master and servant.
>
> (j) Whether the principal is or is not in business.

The Board has reviewed and considered the application of the common law factors on a number of occasions. Prior to the reopening of the record, the initial XPO decision was rendered under the *FedEx Home Delivery* legal framework, where entrepreneurial opportunity represented

merely "one aspect" of whether the evidence demonstrates a contractor is rendering services as part of an independent business. 361 NLRB 610, 620 (2014).

In reversing *FedEx*, the Board found in *SuperShuttle* that "entrepreneurial opportunity is not an independent common-law factor," but rather "a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain." *Id*. at 9, thereby shifting the lens of review of the record facts in this case.

B. Entrepreneurial Opportunity as an Animating Principle

The Board has now issued four decisions (including *SuperShuttle*) on how the common-law factors need to be evaluated through the prism of entrepreneurial opportunity: *SuperShuttle*; *Velox Express, Inc.*; *Intermodal Bridge Transport*; and *Nolan Enterprises, Inc. d/b/a Centerfold Club*.

1. *SuperShuttle*

In *SuperShuttle*, the Union petitioned for a unit of franchisees who operate shared-ride vans for SuperShuttle Dallas-Fort Worth. *Id*. at 1. The Respondent claimed that the franchisees were independent contractors. *Id*. The Board agreed. *Id*.

In determining that the franchisees had significant opportunity for economic gain and significant risk of loss, the Board examined the following factors. First, the franchisees made a significant initial investment in their business by purchasing or leasing a van and entering into a Unit Franchise Agreement. *Id*. at 12. The total investment necessary to begin a franchise ranged from $18,100 to $40,500, which included the cost of the vehicle plus any other initial and weekly fees. *Id*. at 4 n.12. Second, the franchisees had total control over their schedule and were able to work as much as they chose, when they chose, and where they chose. *Id*. at 12. Third, they were able to keep all the fares they collect. *Id*. Finally, they had discretion in choosing to accept bids, "so they can weigh the cost of a particular trip (in terms of time spent, gas, and tolls) against the

fare received." *Id*. Moreover, in a footnote, the Board noted that even though the fares received were set by SuperShuttle, in reality, the fares were "set by the competitive airport transportation market, so even if franchisees could negotiate their own fares, those fares are unlikely to vary significantly from SuperShuttle's fares." *Id*. at 13 n.27. Thus, the Board concluded, the franchisees had significant opportunity for economic gain and significant risk of loss, which strongly supported finding independent-contractor status and it was not outweighed by any countervailing factors supporting employee status. *Id*. at 14-15.

2. *Velox Express, Inc.*

In *Velox Express, Inc.*, a driver brought unfair labor practice charges against her purported employer. Velox provided medical courier services and contracted the work to drivers who would collect and deliver the specimens. *Velox Express, Inc.*, 368 NLRB No. 61, slip op. at 1 (2019).

Here, unlike *SuperShuttle*, the Board's evaluation of the common-law factors through the prism of entrepreneurial opportunity showed that the drivers had little opportunity for economic gain or, conversely, risk of loss. *Id*. at 3. First, the drivers did "not have discretion to determine when and how long they work or to set their routes and the customers they service." *Id*. Rather, Velox assigned routes with specific stops that drivers had to service on designated days and during specific time periods. *Id*. Second, the drivers did not have "a proprietary interest in their routes, and thus they cannot sell or transfer them, nor can they hire employees to service their routes." *Id*. In fact, the drivers could not hire their own substitutes; they had to ask Velox for permission to take time off and Velox would provide a substitute whom it would pay directly. *Id*. n.10. Third, the only way that drivers could increase their income was by choosing a weekend route. *Id*. at 3. Similarly, the method for compensating the drivers did not afford them significant entrepreneurial opportunity because they received the same amount of compensation

no matter their own efforts and initiative. *Id*. Therefore, the drivers did "not have any meaningful opportunity for economic gain (or run any meaningful risk of loss) through their own efforts and initiative" and were deemed employees under the Act. *Id*. at 4.

3. *Intermodal Bridge Transport*

Given that *Intermodal Bridge Transport* is one of the more recent Board decisions and is about XPO's competitor in the Los Angeles area, the case deserves careful attention. In that matter, the Union, which is the same Charging Party as in this case, brought unfair labor practice charges on behalf of drivers who leased trucks from the purported employer. *Intermodal Bridge Transport*, 369 NLRB No. 37, slip op. at 1 (2020).

Applying *SuperShuttle*, the Board determined that the drivers were employees. *Id*. First, unlike in *SuperShuttle*, the drivers had "limited discretion to determine when they work, less discretion to decide what loads to haul, and no discretion to decide to work beyond the end of their shift." *Id*. at 2. The drivers could choose which days to work and when to start, but Intermodal Bridge Transport *assigned* the drivers to either the day or night shift. *Id*. When they report to work, they had to choose their first assignment and then the dispatchers controlled the flow of their work by providing assignments. *Id*. Second, the drivers did not "not have their own routes, let alone a proprietary interest in routes that they can sell or transfer, nor can they hire employees to work in their stead." *Id*. Third, Intermodal Bridge Transport controlled the drivers' compensation and expenses. *Id*. at 2-3. Finally, the drivers did not have to make "a significant initial investment or take on a serious risk of loss to enter into a relationship" because the truck was provided by the Respondent, the truck was leased to the drivers for an assigned shift that they had to return at the end of their shift, the drivers only had to pay for the use of trucks on the days they choose to drive, and the drivers did not have any fixed weekly or monthly fees that they had to pay to Intermodal Bridge Transport. *Id*. at 3. On those facts, the

drivers did not "have any meaningful opportunity for economic gain (or run any meaningful risk of loss) through their own efforts and initiative." *Id*.

4. ***Nolan Enterprises, Inc. d/b/a Centerfold Club***

Most recently, the Board held that dancers at a club were employees under the Act. *Nolan Enterprises, Inc. d/b/a Centerfold Club*, 370 NLRB No. 2, slip op. at 1 (2020). Unlike the high degree of autonomy afforded to the drivers in *SuperShuttle*, the club "exercise[d] significant control over the dancers' day-to-day work (through extensive rules, expectations, supervision, fines, and penalties), their work environment, and the customer base." *Id*. Furthermore, the dancers made minimal investment and had minimal economic risk. *Id*. Finally, the club's revenue was tied to the dancers' performance. *Id*. Thus, the dancers lacked sufficient opportunity for economic gain to render them independent contractors. *Id*.

III. ARGUMENT

A. The Existing Evidence Shows That The Owner-Operators Have Significant Opportunity for Economic Gain Or, Conversely, Significant Risk of Loss

Before examining the various common law factors through the lens of entrepreneurial opportunity, it is important to recognize that the compensation among Owner-Operators is directly linked to their entrepreneurial efforts. It is no accident that the highest-earning Owner-Operator earned over $500,000, while some Owner-Operators earned $25,000 or less. Trauner 1959-60. In between those extremes are Owner-Operators who made over $90,000. Ackling 1561. *See Argix Direct, Inc.*, 343 NLRB 1017, 1021 (2004) (the Board found it relevant that the Owner-Operators' gross payments "var[ied] greatly…from a low of $42,911.68 to a high of $92,129.77"). Unlike in *Velox Express*, 368 NLRB No. 61, slip op. at 3, where "[t]he drivers receive the same amount of compensation no matter what they do," the wide range in

compensation alone shows that Owner-Operators at XPO do have the *actual* significant potential for economic gain (or, conversely, risk of loss) through their own efforts and initiative.

1. The Owner-Operators Have Total Autonomy To Decide Whether, When, Where, And How Long They Work

As the Administrative Law Judge properly noted in her initial decision, XPO "does not dictate the drivers' work schedule, require the drivers to work a set number of hours, or control when the drivers choose to take days off from working[.]" Administrative Law Judge Decision, at 17. The Owner-Operators themselves "determine which days, specific hours, and the number of hours to work (work shift); the distance they are willing to travel for a load; when and how much time to take off from work for sick leave, vacation, or any other reason." *Id*. at 6. Indeed, Owner-Operators never need to drive at all. Del Campo 1699-1700; Trauner 1952-53. Unlike in *Intermodal Bridge Transport*, however, there are no "shifts" because XPO does not schedule start times, end times, or shifts for Drivers. Montenegro 1445-46, 1507; Camacho 1138-39; Trauner 1981-82. The Owner-Operators are not assigned to delivery regions. Decoud 1586. Rather, they can choose whether and where they want to work based on their geographic preferences or any other factors of their choosing. Herrera 117- 18, 194-95; Decoud 1591-92; Ackling 1542-53; Rodriguez, 1642-44. Moreover, Owner-Operators are free to provide services to other companies (or independently if they have their own DOT operating authority) at any time, including for direct competitors of XPO. Trauner 1983-84; Decoud 1592; Del Campo 1700. Thus, like in *SuperShuttle*, the Owner-Operators have "total control over their schedule, they work as much as they choose, when they choose[,]" and have the geographic freedom to choose where they work. *SuperShuttle*, at 12.

2. The Owner-Operators Have Discretion Over The Loads They Choose To Accept

Similarly, the Administrative Law Judge properly found that the Owner-Operators "have broad discretion in determining whether to accept an assignment from dispatch." Administrative Law Judge Decision, at 5. This allows Owner-Operators to weigh the cost of a particular trip in terms of distance, weight of the load (which impacts fuel compensation), and if a particular customer or location (such as at the Ports) has a reputation for wasting the Owner-Operator's time, against the compensation received. Rodriguez 1644-46. Here, the Owner-Operators are more akin to the franchisees in *SuperShuttle* who make a similar calculation in determining whether to accept or reject an assignment, and not the drivers in *Velox Express* and *Intermodal Bridge Transport* who had a limited ability to reject work.

3. The Owner-Operators Have Extraordinary Opportunities to Increase Their Compensation

As mentioned above, there is a wide range in compensation among the Owner-Operators. This is because the Owner-Operators' "compensation varies depending on many factors e.g., number of deliveries, miles driven, number of trucks leased or owned, number of second-seat drivers." Administrative Law Judge Opinion, at 19. Testimony from the initial hearing showed that other factors included the speed of the drivers, whether drivers were willing to take some of the less desirable loads, whether drivers have special endorsements like hazmat, whether the drivers had a TWIC card, and whether drivers can go in and out of the port. Trauner 1960.

Take for example Raul Valdez, the contractor who earned over $500,000. *Id*. 2010. He owned multiple trucks and clearly was able to utilize them successfully. *Id*. Testimony showed that eight to ten Owner-Operators had drivers operating under them.[1] Del Campo 1698.

[1]In the face of this testimony, the Administrative Law Judge incorrectly found that only two drivers hired other drivers to work for them. Administrative Law Judge Opinion, at 5. As will be shown later, XPO attempted to

Because of federal hours of service regulations, an Owner-Operator can only drive for a certain maximum amount of hours per day. *See generally* 49 C.F.R. § 395.3. By hiring second-seat drivers, Owner-Operators can maximize their revenue per day, especially during the periods when an Owner-Operator is prohibited to work by federal regulation or just chooses not to work. Trauner 1960. Plus, if Owner-Operators had multiple trucks and hired drivers to work for them, they would be able to exponentially increase their compensation, as demonstrated by Mr. Valdez earning over $500,000.

Of course, some Owner-Operators *choose* not to hire second-seat drivers or choose not to own multiple trucks. For example, Michael Ackling only had one truck and no drivers under him because he "never met anybody [he] trusted to drive [his] truck." Ackling 1555. In contrast to Mr. Valdez, Mr. Ackling earned approximately $90,000 to $100,000. Ackling 1561.

Moreover, Owner-Operators must compete for the services of second-seat drivers, and even if an Owner-Operator hires another driver, there is no guarantee that the arrangement will be successful. Owner-Operators always face the potential of losing a second-seat driver to another Owner-Operator, and have to offer favorable compensation structures and even develop incentives for the drivers to stay with the Owner-Operators for a longer period of time. Davis 1785-87. Crucially, however, XPO plays no role in setting second seat driver compensation, nor even knows what any particular driver is paid. Trauner 1952.

Thus, unlike the drivers in *Velox Express*, at 3, and *Intermodal Bridge Transport*, at 4, who could only increase their income by requesting a weekend route or by working more hours, the XPO Owner-Operators had various opportunities to increase their income.

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enhance the record to show that in fact, approximately twenty Owner-Operators hired other drivers to work for them.

4. The Owner-Operators Have Control Over Hiring Drivers To Work In Their Stead

Relatedly, the Owner-Operators can hire drivers (and many have) to complete the assignments for them. Trauner 1951- 52, Avalos, 253-54, 350, 386-387, 401, 467-68, Canales 762, 904-06, Solis 2071-72, 2076, Gaitan 642, 716-17, Lopez 620-21, Montenegro 1452-53, Davis 1766-68, 1775. Recruiting and hiring second-seat drivers is exclusively the responsibility of the Owner-Operator. Montenegro 1453; Davis 1783-84. The Owner-Operators set the terms of engagement for second-seat drivers. GC Exh.60 at Section 11, Gaitan 643, Montenegro 1455; Davis 1792, Avalos 253-54, 384, 384; Canales 895, 904-06; *see also* Lopez 620-21

The Administrative Law Judge's opinion incorrectly discounts such hiring on the grounds that Owner-Operators do not enjoy "true control" over the hiring of second-seat drivers. Administrative Law Judge Opinion, at 23. She based that incorrect finding, in part, on the fact that XPO had to approve such hiring. But that oversight is imposed by federal regulation. No driver—including a second-seat driver—can drive a commercial motor vehicle unless they complete and furnish to the federally regulated motor carrier, in this case XPO, an application for employment meeting certain content requirements. *See* 49 C.F.R. § 391.21. All XPO does is the legally required ministerial act of ensuring that second-seat drivers complete "employment applications" consistent with federal and local regulations. Gaitan 715; Flores 1312-13; Maleski 1849-51. Complying with regulations cannot suggest employee status. *See SuperShuttle*, at 13 ("But these requirements are not evidence of SuperShuttle's control over the manner and means of doing business because they are imposed by the state-run DFW Airport"); *see also Don Bass Trucking Co.*, 275 NLRB 1172, 1174 (1985) ("Government regulations constitute supervision not by the employer but by the state.") (internal citations omitted).

Nor does the Administrative Law Judge's finding that XPO's refusal to approve one driver, Humberto Canales, to carry loads for XPO supports her finding that Owner-Operators did not control hiring. The Administrative Law Judge reasoned that "if the driver had true control over hiring the second-seat driver, ….the driver should have been the ultimate decision maker." Administrative Law Judge Opinion, at 23. But the Administrative Law Judge ignored the fact that while XPO can prevent an Owner-Operator from utilizing a particular driver to carry loads for XPO's customers, XPO has absolutely no control over whether the Owner-Operator hires a driver to carry loads for a different motor carrier. *See* GC Exh. 60 at Section 4(C) ("Except as restricted by Applicable Law (including 49 CFR Part 376), nothing in this Contract will prohibit Contractor from performing transportation services for other carriers, brokers or directly for shippers."). This is consistent with the fact that XPO has written agreements with the Owner-Operators, but not with the second seat drivers whom those Owner-Operators hire. Trauner 1951-52. Furthermore, the Administrative Law Judge incorrectly found that "Canales was rejected as a second seat driver for reasons totally unrelated to federal mandates… because the dispatchers felt Canales was difficult, rude, and demanding." Fundamentally, as the customer of the Owner-Operators, XPO has the ability without affecting employment status to insist that the Owner-Operator not use a particular driver who disrupts and interferes with the safety of XPO's dispatching operation. *See* GC Exh. 60 at Section 5(A). A homeowner customer of a plumbing service could similarly direct that business not to send a particular plumber to his home after the plumber behaved rudely or unsafely on earlier jobs. Doing so would not render the plumber or plumbing service the employee of the homeowner. Moreover, the federal regulations require XPO to examine the character of a driver, and XPO's refusal to allow an Owner-Operator to utilize Canales as a driver for XPO's customers is consistent with that mandate. 49 C.F.R. §

391.21 is located under Subpart C titled "Background and Character" and various federal regulations define Subpart C as "relating to disclosure of, investigation into, and *inquiries about* the background, *character*, and driving record of drivers." *See* 49 C.F.R. §§ 391.67(b); 391.68(b) (emphasis added). The regulations thus presume that a motor carrier will be able to decide whether a particular driver may perform services for the motor carrier, regardless of whether a driver is an employee or independent contractor.

5. The Owner-Operators Make a Significant Initial Economic Investment and Face Significant Economic Risk

The Owner-Operators invest enormous sums of money in their equipment and its upkeep. Numerous Owner-Operators testified that they invested over $100,000.00 in the purchase of their trucks alone.[2] Lopez 540-41, Montenegro 1457. Those who do not yet outright own their trucks generally finance their trucks or take part in lease-to-own programs, wherein they make lease payments over several years, and then make a balloon payment at the end of the lease term in order to purchase the truck outright. Lopez 628-29; Gaitan 744-45; Canales 912; Camacho 1133; Trauner 1966-67. It matters little whether that investment is through a purchase or a lease; the right conveyed to operate the truck is the same. *See Argix Direct, Inc.*, 343 N.L.R.B. at 1020.

The need to protect their investment requires the Owner-Operators to responsibly maintain their tractors. Where, how, and when they do so is entirely their decision. Lopez 560; Camacho 1265; Flores 1311; Montenegro 1457, 1459-60; Decoud 1600. A failure to make good maintenance decisions can result in an expensive, and even catastrophic, loss. *See* Montenegro 1456-57. Major repairs easily can cost between $3,000 to around $24,000. Montenegro 1593-94,

[2]The decision of what truck to buy and how to buy it is one made exclusively by the Owner-Operators, and XPO plays no role in the decision. GC Exh. 60 at Sections 1(A), 4(A)(1); *see also* Trauner 1968-69. The trucks can be any color, make, or model. Montenegro 1462-63; 1464-65, 1502-03 Decoud 1605; Ackling 1533-34, GC Exh. 60 at Section 1(A), 4(A)(1).

Avalos 459; Camacho 1102; Perez 1735, 1738, 1742-43. Failure to manage expenses or to properly run their businesses presents a real risk of failure and bankruptcy. *See* Avalos 393-94. Thus, unlike the drivers in *Intermodal Bridge Transport*, the XPO Owner-Operators make a significant initial investment in their business and face significant economic risk by purchasing or leasing a truck. *Cf. Intermodal Bridge Transport*, at 3 (finding that "the drivers do not have to make a significant initial investment or take on a serious risk of loss to enter into a relationship with the Respondent" when, in part, the drivers "pay for the use of its trucks on the days that they choose to drive").

6. <u>Owner-Operators Were Able To Negotiate Their Compensation</u>

The record was clear that Owner-Operators knew that they could negotiate the terms of the Independent Contractor Operating Contract and for additional pay above and beyond what was set forth in the Contract. Numerous Owner-Operators engaged attorneys to negotiate the terms of the Independent Contractor Operating Contract ("ICOC"), and changes were made to the ICOC based on these legal negotiations. Camacho 1165-69, 1182-83, Trauner 1983. Furthermore, the ICOCs expressly contemplate pay negotiations. GC Exh. 60 at Schedule B at Section 2: "Changes In Fees." *See also* GC Exh. 57 at Exhibit C ("Carrier and you may also agree to spot pricing for a particular shipment that differs from the standard point-to-point or mileage basis."). The spot pricing negotiations were not a "ruse" or "resulted in across-the-board pay increases for the drivers regardless of whether or not they 'negotiated' with the Respondent." *Intermodal Bridge Transport*, at 2 n.6. In fact, on numerous occasions, XPO had to negotiate with Owner-Operators in order to find a driver willing to take on a less desirable or urgent delivery. Del Campo 1702-03. Because the Owner-Operators had broad discretion to accept (or reject) assignments, this increased their bargaining power in spot pricing negotiations and resulted in individual drivers earning extra pay of $50, $100, and even $200, depending on the

situation. *Id*. ("We asked him if he can stay -- layover, which is a standard 150 in the Schedule B. And he said no, thank you. So we negotiated a higher rate of, I believe it was $350 for him to stay over there.").

B. ***SuperShuttle*** **Supports a Reevaluation of Other Common Law Factors**

Briefly put, the Administrative Law Judge incorrectly determined that two additional common law factors—the relationship the parties believed they created and the method of payment—supported employee status, and failed to allocate weight to the ICOC's indemnification agreement.

In *SuperShuttle*, the Board noted that the provisions in the franchise agreement left "little doubt as to the intention of the parties to create an independent-contractor relationship between SuperShuttle and its franchisees." *SuperShuttle*, at 14. Furthermore, two other factors supported this conclusion: the company did not provide franchisees with any benefits, sick leave, vacation time, or holiday pay and it did not withhold taxes or make any other payroll deductions from franchisees' pay. *Id*. On a related point, the *SuperShuttle* Board did not conclude that a finding of employee status was warranted where franchisees could not negotiate over whether they were to be independent contractors or employees. *SuperShuttle*, at 4.

Here, like in *SuperShuttle*, the Owner-Operators "signed the ICOC and the attached Schedule N acknowledging their independent contractor status and the responsibilities and rights therein," and XPO did not withhold taxes from the Owner-Operators' pay or provide them with fringe benefits. Administrative Law Judge Opinion, at 15, 20. Yet, the Administrative Law Judge relied on *Fedex*'s holding "that independent-contractor agreements are not necessarily conclusive evidence of the intent of the parties when one of the parties has not been afforded the opportunity to negotiate the terms of their employee status in the agreement." *Id*. at 20. Under *SuperShuttle*, the existence of the ICOC is indicative of independent contractor status.

Moreover, in *SuperShuttle*, the franchisees were unable to negotiate over whether they were employees or independent contractors. *SuperShuttle*, at 4. Since the *SuperShuttle* Board did not consider whether the franchisees were afforded the opportunity to negotiate over their employee status, it is improper to do so here, especially where the *SuperShuttle* franchise agreement was "a standard agreement that is not subject to negotiation by individual franchisees." *SuperShuttle*, at 4. Since the present case is on all fours with *SuperShuttle*, these factors—whether the parties believed they created an independent contractor relationship and whether the method of payment was consistent with that relationship—support finding that the Owner-Operators are independent contractors.

Additionally, in *SuperShuttle*, the Board considered the franchisee's requirement to indemnify and hold SuperShuttle harmless "against any and all liability for all claims of any kind or nature arising in any way out of or relating to the Franchisee's and Operator's actions or failure to act." *Id*. at 12. The indemnification weighs in favor of independent-contractor status because "[s]uch indemnification greatly lessens SuperShuttle's motivation to control a franchisee's actions, since SuperShuttle is not liable for a franchisee's negligent or intentionally harmful acts." *Id*. Here as well, the Owner-Operators indemnify XPO for various losses or damages that may arise during the performance of their services. See GC Exh. 60 at Sections 6(A)(7), 20; GC Exh. 57 at Sections 8(A), 8(E), 9. Thus, indemnification should also weigh in favor of independent-contractor status.

Finally, the Owner-Operators do not receive an hourly rate and are not guaranteed any revenue from XPO. Canales 949, GC Exh. 60 at Section 12; Montenegro 1468. Rather, on a weekly basis, XPO compensates Owner-Operators pursuant to the ICOC based on the type of delivery and the distance traveled in miles. Lopez 575-76; Camacho 1261. Thus, the Owner-

Operators are paid by the assignment. *See Argix Direct*, 343 NLRB at 1021 (drivers paid like independent contractors where paid "based on a sliding scale that depends upon the length of the route for the day.").

C. Existing Evidence Shows That Second-Seat Drivers Do Not Have A Contractual Or Employment Relationship With XPO

XPO has contractual agreements only with Owner-Operators. Second-seat drivers did not execute ICOCs with XPO. GC Exh. 60; Trauner 1951-52. These drivers sign only Schedule K to the Owner-Operators' ICOC with XPO, confirming their contractor status. See GC Exh. 60 at Schedule K. XPO does not dictate their hours or pay nor do these drivers receive compensation from XPO. Trauner 1952. In fact, only Owner-Operators receive a 1099 tax form from XPO. Canales 930-31; Ackling 1561; Decoud 1604.

Rather, second-seat drivers have a contractual or employment relationship with their Owner-Operators. The evidence shows that Owner-Operators enter into independent-contractor agreements with their second-seat drivers. Davis 1774-75; Respondent's Exh. 32. Furthermore, the Owner-Operators are the ones who provide their drivers with 1099 tax forms. Davis 1781; XPO Exh. 3.

It is the Owner-Operators who set the compensation for these drivers. Avalos 253-54, 384; Canales 895, 904-06. Second-seat drivers also exercise the ability to negotiate higher rates from Owner-Operators. For example, Canales paid his second-seat Driver 40% of the money earned off his truck. Canales 904-905. Avalos similarly was paid 40% while driving for Alva; but he then negotiated to be paid 45% from both Ruiz and Magana. Avalos 384, 391-92. Indeed, there is a range in the second-seat drivers' payment terms, none of which is controlled by, or even known to, XPO. Davis 1784-85; Trauner 1952.

D. The Supplemental Evidence Confirms The Owner-Operators Have Significant Opportunity for Economic Gain Or, Conversely, Significant Risk of Loss

1. XPO Is The Owner-Operators' Customer

XPO's enhanced record evidence shows that in the intermodal business, companies like XPO are the Owner-Operators' customers; the Owner-Operators provide only a limited portion of the overall transportation services needed to move the freight owned by XPO's customers. Cargo owners who need to move cargo across the United States contract with XPO to do so. Tibbetts 2164. The entire intermodal move contains a long rail haul that is bookended by two local short hauls. *Id*. The "long haul" involves moves in excess of 500 miles—sometimes even above 1000 miles—and it is the most expensive portion of the intermodal move. Tibbetts 2164, 2223. By contrast, the local short hauls are within 100 miles, and the Owner-Operators who provide that portion of the move are in high demand in a highly competitive industry, which also provides insight to XPO on where their rates are vis-à-vis their competitors. Tibbetts 2164, 2171, 2227. Because the Owner-Operators are providing services that constitute a small piece of a much larger move, the nature of their business prevents them from negotiating with XPO's customers. It is not possible for Owner-Operators to negotiate directly with the cargo owners in the intermodal business because they do not have contracts with railroad providers as XPO does. Tibbetts 2171. Thus, unlike the situation where a company hires drivers to move its own goods on a regular basis, the Owner-Operators are bidding for a small piece of a bigger move that is paid separately from what the customer pays XPO. Tibbetts 2223.

a. XPO's Compensation Is Not Related To The Compensation Earned By Owner-Operators

Customers who contract with XPO pay a specified amount for the intermodal services and that amount is based primarily on the expensive long rail portion of the move, and not the

amount that XPO pays to Owner-Operators. *Id.* Unlike in *Nolan Enterprises, Inc.*, if Owner-Operators complete more loads, it does not necessarily mean that XPO profits more. 370 NLRB No. 2, at 2. Unlike *Nolan Enterprises, Inc.*, where the primary vendors for the club were the dancers themselves, here, the railroads, not the Owner-Operators, constitute a majority of the vendor cost for XPO. Tibbetts 2171. Similarly, the compensation that XPO receives from the customer is not dependent on revisions to the contractual amounts XPO has agreed to pay Owner-Operator via Schedule B to the ICOC. In fact, because of the dynamic nature of the Schedule B changing every 90 days, Tibbetts 2203, XPO does not routinely go back to the customer to change the contract price, Tibbetts 2225. Therefore, there is no clear relationship between XPO's compensation from the customers and the Owner-Operator's compensation from XPO.

2. XPO Attempted To Enhance The Finding That The Owner-Operators' Gross Payments Varied Greatly

Consistent with the Board's order to examine this case through the lens of entrepreneurial opportunity under *SuperShuttle*, at the supplemental hearing, XPO attempted to enhance the evidence regarding the wide gap in gross payments to Owner-Operators, but both the General Counsel and the Charging Party objected to the introduction of the evidence and the Administrative Law Judge precluded its admission.[3] The evidence should have been admitted. While all of the parties agree that there is evidence already in the record about the compensation for Owner-Operators varying from over $500,000 to $25,000 a year, Tr. 2184, 2452, there was little evidence exploring how Owner-Operators performed within this spread and thus the degree

[3]The evidence included the individual 1099 Forms and Excel files of the Settlement Data, as well as a summary of the 1099 Forms and Settlement Data, for the 2015-2017 time period. XPO Exhs. 43-45; 50-58; 60-61; *see also* Appendix A.

to which entrepreneurial opportunities were available to Owner-Operators.[4] Mr. Tibbetts' testimony shed light on the fact that ***over half*** of the Owner-Operators (approximately 60-63 of them) received compensation in excess of $100,000 in 2015. Tibbetts 2186. The individual 1099 Forms (and their corresponding summaries) that XPO attempted to introduce would have further showed the breakdown in compensation and that highly significant entrepreneurial opportunities existed for the Owner-Operators. XPO Exhs. 43-45; 50-58.

3. XPO Attempted To Enhance The Record To Explain Why The Gross Payments Varied Greatly

XPO's attempted enhancements to the record would have shown the reasons why the Owner-Operators had significant entrepreneurial opportunity; its evidence on this issue was wrongly excluded. XPO's evidence, including the compensation summaries in particular, would have showed not only the reported 1099 amounts, but also whether an Owner-Operator owned multiple trucks and/or hired second-seat drivers (information that was available from the underlying Settlement Data Excel files). XPO Exhs. 43-45. The information would have shown that actually 18 Owner-Operators had second seat-drivers in 2015 and 22 Owner-Operators had second-seat drivers in 2016. Tr. 2472-73 (Offer of Proof). Furthermore, the precluded evidence would have shown that there were several Owner-Operators like Mr. Valdez who were able to exponentially increase their economic gain by hiring second-seat drivers and/or having multiple trucks. XPO Exhs. 43-45. Additionally, the evidence would have shown that multiple ways for Owner-Operators to maximize their compensation including considerations that must be taken into account when accepting or rejecting a load:

- Geographic issues such as traffic density and time of day when particular routes are more difficult to access;

[4]Only Mr. Ackling testified that he earned over $90,000. Ackling 1561

- Tradeoff between long hauls and short hauls;
- Time of day and time of week to maximize total loads done in a day and also a certain type of load called a drop and hook, which allows the Owner-Operator to have a short wait time so that they can get back on the road, and then be compensated for another move;
- Selection of particular customers or specialized loads; and
- Negotiations over premium and incentive payments above Schedule B.

Tr. 2272- 82 (Offer of Proof)[5].

4. XPO Further Enhanced The Record Concerning The Entrepreneurial Aspects Of Load Selection And Rejection

At the supplemental hearing, XPO also presented evidence showing the manner in which the selection or rejection of loads reflected entrepreneurial opportunity for the Owner-Operators. Because Owner-Operators can select or reject loads at will, the testimony showed how important it was for the dispatchers working for XPO to know an Owner-Operator's preferences. Flores 2296. Dispatchers first acquired this knowledge during the onboarding process for a new Owner-Operator, where dispatchers are introduced to the Owner-Operator. Quiroz 2244; Flores 2307. As part of the introduction process, dispatchers would try to learn a new Owner-Operator's preferences, as well as any capabilities or licenses for handling special work outside of just local dispatch. Quiroz 2242. Then, after some time, dispatchers begin to learn what the Owner-Operators want, what their needs are, and their preferred schedules. Flores 2301.

Dispatcher knowledge about Owner-Operator preferences is critical because the dispatchers cannot require Owner-Operators to take loads. Flores 2295-96; 2318-19. Dispatchers thus use this information when they have to dispatch undesirable loads. *Id*. 2301. If

[5]Although XPO contends that the Administrative Law Judge incorrectly struck the Offer of Proof, XPO also attempted to admit into evidence a summary of the total amount of premiums paid above Schedule B. XPO Exh. 46; Tibbetts 2201-08.

a dispatcher cannot get an Owner Operator to take a particular load, he can bundle the move together with other sufficiently attractive ones to get the Owner-Operator to accept the package of moves. Whereas an incentive payment might sweeten the deal for the Owner-Operator to take an individual load, bundling involves creating a package of multiple moves that an Owner-Operator could accept if it might make an undesirable move worth his or her while. *Id*. 2299-2301. Much like incentive payments are sometimes needed to get an Owner-Operator to accept an otherwise undesirable load, dispatchers may also have to provide Owner-Operators with sufficient opportunity for economic gain by bundling multiple loads. Only by knowing the preferences of Owner-Operators can dispatchers put together such tailored packages. *Id*. 2301.

Furthermore, the General Counsel's cross-examination of Mr. Flores only confirmed the Administrative Law Judge's finding that Owner-Operators have broad discretion to accept or reject a load. The General Counsel focused on the specific instance of when an Owner-Operator cannot finish a move (such as when they exceed their driving time limit, had an accident and were injured, or were stopped because their license lapsed). *Id*. 2315-17. While XPO does request other Owner-Operators to go recover a load in such instances, the other Owner-Operator still has the ability (as it would have with other loads) to refuse to recover that load. *Id*. 2318. This ability to accept or reject loads is so absolute, moreover, that if none of the Owner-Operators who is available agrees to take on a particular move, XPO either has to reschedule it with its customer or hire an outside company to move the freight. Rodriguez 2266-67.

5. The Schedule B Rates Are Set By the Competitive Los Angeles Drayage Market

Although there is already extensive evidence in the underlying hearing showing that Owner-Operators were able to negotiate with XPO, any reliance on the Schedule B by the General Counsel or the Charging Union to show that the Owner-Operators were not able to

negotiate their compensation would be misplaced. The Schedule B is more akin to the fares in *SuperShuttle*. There, the Board mitigated the fact that the fares were set by SuperShuttle by highlighting that as a practical matter, the fares were "set by the competitive airport transportation market, so even if franchisees could negotiate their own fares, those fares are unlikely to vary significantly from SuperShuttle's fares." *SuperShuttle*, at 13 n.27. The same is true here. Even if the Owner-Operators could negotiate their own fares, the fares are set by the competitive Los Angeles drayage market and an Owner-Operator's rate of pay is unlikely to vary significantly from XPO's. This is because the highly competitive industry is gained or lost in cents per mile. Tibbetts 2227. Any difference in pay between XPO and the other competitors would be in the cents per mile. *Id*.

6. The Owner-Operators Were Able To Reject The Optional Incorporation Incentive

Owner-Operators were always the ultimate decision makers on whether to pursue any incentives or premiums, which again reflects the significance of their entrepreneurial opportunities. At the hearing, the Charging Party admitted into evidence an incorporation incentive that XPO offered to Owner-Operators in 2016. CP Exh. 4. According to the Union, the incorporation incentive "demonstrates that XPO played a direct role in pushing its drivers to, you know, do things that make them appear more independent, when drivers would not have done that otherwise." Tr. 2428. In reality, XPO offered a one-time incentive for Owner-Operators to incorporate by April 1, 2016. CP Exh. 4, at 3. The fact that there were only fifteen Owner-Operators who were incorporated as of the date of the Administrative Trial, however, shows that the vast majority of Owner-Operators *refused* this incentive. This fact thus demonstrates actual entrepreneurial opportunity and weighs in favor of independent contractor status. Administrative Law Judge Opinion, at 5; *cf. Nolan Enterprises, Inc.*, 370 NLRB No. 2 at

1 n.3 (noting that Employer's attempt to "deemphasize the significance of the guarantee by arguing that the guarantee was optional" was not successful when only one worker opted out of the guarantee).

E. XPO's Emphasis On Safety Does Not Support The Charging Party's Argument For Employee Status

During Mr. Enrique Flores' cross-examination, the General Counsel and the Charging Union emphasized areas where XPO instituted and enforced safety policies above what may have been required under federal law. But even if XPO's focus on safety concerns impacting Owner-Operators go beyond the stated minimum requirements, they are still consistent with the FMCSA's regulatory scheme because the regulations establish only "the minimum qualifications for persons who drive commercial motor vehicles," and nothing in the regulations "shall be construed to prohibit an employer from requiring and enforcing more stringent requirements relating to safety of operation and employee safety and health." 49 C.F.R. §§ 391.1(a), 390.3(d); *see also* 49 C.F.R. § 390.5 (defining "employee" as "including an independent contractor while in the course of operating a commercial motor vehicle"). Moreover, XPO is required to "demonstrate it has adequate safety management controls in place, which function effectively to ensure acceptable compliance with applicable safety requirements to reduce the risk associated with: [multiple FMCSA violations]." 49 C.F.R. § 385.5; *see also id.* § 385.3 (defining "Safety management controls" as "the systems, policies programs, practices, and procedures used by a motor carrier to ensure compliance with applicable safety and hazardous materials regulations which ensure the safe movement of products and passengers through the transportation system, and to reduce the risk of highway accidents and hazardous materials incidents resulting in fatalities, injuries, and property damage."). Federal regulations require motor carriers like XPO to ensure Owner-Operators comply with legal regulations. 49 C.F.R. §

390.11. If XPO does not comply with federal regulations, FMCSA may suspend or revoke XPO's motor carrier registration. *Id*. § 385.905(a).

Along this same line of argument, the General Counsel and the Charging Union may try to rely on the following to overturn the Administrative Law Judge's correct factual finding that the drivers do not receive evaluation, audits, or training:

- XPO had "counseling" sessions when a driver has a high CSA score. Flores 2359.
- Drivers are required to report a poor roadside inspection to XPO and have to complete an online remedial training and to fill out paperwork. Flores 2362-66.
- Between 2013 and 2016, XPO or Pacer charged back contractors who incurred any bad roadside inspections.[6] Flores 2366, 2373.
- XPO would counsel the driver if they failed to conduct a pre-trip inspection and require that the driver complete an online remedial training. Flores 2374.
- XPO issued Violation Summary Letters and counseled drivers who violated the federal hours of service regulations, and terminated their contract if they repeatedly violated hours of service regulations.[7] Flores 2379-80, 2384, 2404-05.
- XPO was required under the federal regulations to conduct an annual motor vehicle record review, and if a driver committed a series of driving history-related infractions, they would be disqualified from driving with XPO. Flores 2396-98.
- XPO disqualified drivers for speeding. Flores 2434
- XPO set a 75-point limit for CSA scores. Flores 2422-23.

Each of these facts relates directly to safety, and regardless of the Owner-Operators' status an independent contractors or employees, XPO is required to ensure Owner-Operators comply with legal regulations and have adequate safety management controls in place. *See* 49 C.F.R. §§ 385.5, 390.11; *see generally* 49 C.F.R. §§ 396.9 (requirements surrounding roadside inspections), 396.13 (requirements surrounding pre-trip inspections), 395 (requirements

[6]The reliance on this factor is dubious especially since it is outside the time period of the hearing and Mr. Flores testified that Pacer had such a policy, but was not sure if XPO did. Flores 2366.

surrounding hours of service). Even if a "counseling session" or "remedial training" or any other policy may not be explicitly required by federal law, it all falls under the FMCSA regulatory regime's focus on maintaining "adequate safety management controls in place, which function effectively to ensure acceptable compliance with applicable safety requirements." *Id*. § 385.5; *see also* Flores 2431 ("Well, we're required, as a motor carrier, to certify that we have a place where drivers can be qualified and trained.") This also applies to any policy XPO had about disqualifying drivers for speeding and/or if they committed a series of other driving history-related infractions that may have been above what federal law requires. Finally, just because a policy or course of action is not explicitly mandated, the FMCSA regulations are not to be construed to "prohibit an employer from requiring and enforcing more stringent requirements relating to safety of operation and employee safety and health." 49 C.F.R. § 390.3(d). Thus, it is clear nothing in the regulations prevents XPO from maintaining and enforcing any of the above safety of operation policies.

The same rationale applies to the CSA scores for which there was already extensive evidence in the record. *See* Flores 1300-1309; Maleski 1867-71; XPO Exhs. 19-20. The General Counsel and the Charging Union's examination of Enrique Flores during the supplemental hearing brought out only what was already known: (1) the federal CSA program tracks the safety performance of both drivers and motor carriers; (2) a higher CSA score is worse than a lower CSA score; (3) driver CSA scores are based on the same seven factors as a carrier's CSA score; and (4) a change in the driver's CSA score can also impact the carrier's CSA score. Flores 2354, 2359, 2362; GC Exh. 85; XPO Exhs. 19-20. Although that evidence is not in dispute, the General Counsel and the Charging Union overstate its import to the extent that they point to the fact that XPO sets a non-federally mandated threshold for driver CSA scores, would schedule a

"counseling session" with the driver if they have a high score, and that XPO would disqualify and/or terminate the contract if they accumulate a score above the threshold. Flores 2359-60; 2422-23. CSA scores are part of the broader XPO effort to comply with safety regulations and are thus not reflective of employee status. Flores 2430-31. Importantly, the threshold for taking action is not mandated by the FMCSA because it "has not said (and will not say) what action a carrier should take against a driver who has a lot of violations." XPO Exh 20, at 15-16 (In response to "Question: Is there a number of 'points' that, if exceeded, will require a carrier to terminate a driver?") Under the regulations, the determination of what action to take (and at what CSA score level) is left up to the discretion of the motor carrier like XPO. *Id*. Accordingly, the existence and stringent enforcement of XPO's safety protocols do not at all support a finding that the Owner-Operators should be classified as employees.

IV. CONCLUSION

For the foregoing reasons, the Owner-Operators and their second-seat drivers are properly classified as independent contractors and are not within the protections of the Act. Accordingly, in light of the new *SuperShuttle* standard, the Administrative Law Judge's Decision finding the Owner-Operators to be employees should be reversed and the complaint dismissed.

DATED: December 7, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marshall Babson, an attorney, do hereby certify that I have caused a true and correct copy of the foregoing XPO CARTAGE, INC.'S POST-HEARING BRIEF served on the Division of Judges via electronic filing, and on all parties of record via email on this 7th day of December 2020:

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